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IN THE

Supreme Court of the United States

No. 1075

Term, 19

HARRY C. ZUBIK and LORRAINE F. ZUBIK, his wife, and HARRY ZUBIK COMPANY, INC., LAWRENCE W. BEAVER, JAMES H. HALEY, CHARLES THORNTON and ELMER P. GRIMM,

vs.

CHARLES ZUBIK, JR. and VIRGINIA ZUBIK DRAMBEL, Executors of the Estate of Charles Zubik, Sr.

In the Matter
of
Petition of CHARLES ZUBIK, individually, for Exoneration from or Limitation of Liability.

HARRY C. ZUBIK, LORRAINE F. ZUBIK, his wife, HARRY ZUBIK COMPANY, INC., LAWRENCE W. BEAVER, JAMES H. HALEY, CHARLES THORNTON and ELMER P. GRIMM,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Introduction

Harry C. Zubik and Lorraine F. Zubik, his wife, Harry Zubik Company, Inc., Lawrence W. Beaver, James H. Haley, Charles Thornton, and Elmer P. Grimm pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit re-

versing judgments entered in their favor against Charles Zubik, Sr., individually, in the United States District Court for the Western District of Pennsylvania. The opinion of the United States District Court for the Western District of Pennsylvania (Appendix A) has not been reported. The opinion of the United States Court of Appeals for the Third Circuit (Appendix B) is reported at 384 F. 2d 267 (3rd Cir. 1967).

Jurisdiction

The judgments of the United States Court of Appeals were entered September 29, 1967 (Appendix C). Petitioners filed a timely Petition for Rehearing on October 14, 1967 which was denied by the Court of Appeals on November 6, 1967 (Appendix D). Jurisdiction is conferred on this Court by 28 U. S. C. A. § 1254 (1).

Questions Presented

I. Whether the corporate fiction may be pierced by victims of a maritime tort where the victims of the tortious misconduct cannot prove expressly and specifically (1) that the corporation was formed "deliberately, with specific intent to escape liability for a specific tort or class of torts" (Appendix B, *infra.* p. 50) and (2) that they "relied upon [the said] Corporation's being more than a mere operating company!" (*ibid.*)

II. Whether the Court of Appeals, in a case lying within the admiralty and maritime jurisdiction, may try a portion of the case *de novo*, make its own findings of facts and overturn the findings of the district judge who heard the case in the first instance.

Statement of the Case

The Petitioners were libelants in a series of claims brought in the United States District Court for the Western District of Pennsylvania wherein the jurisdiction was predicated upon the general admiralty and maritime law. Suit was brought against both Charles Zubik, Sr. and Charles Zubik & Sons, Inc. The determination of liability as to the insolvent Charles Zubik & Sons, Inc. was sustained by the United States Court of Appeals and that matter is not now before the Court. Neither is the issue of damages before the Court, said damages totalling $207,540.00. Petitioners here also appeared as claimants in the proceeding wherein Charles Zubik, Sr., petitioned for exoneration from or limitation of liability. Petitioners were also claimants in the proceeding wherein Charles Zubik & Sons, Inc. filed such a limitation petition, but that matter was determined adversely to the corporation by both courts below, and that matter is not now before this court. The district judge refused limitation as to both Charles Zubik, individually, and Charles Zubik & Sons, Inc., placed liability on both on grounds of negligence, and determined that Charles Zubik was liable, individually, both because of his own direct negligent participation in the events leading up to the maritime disaster and because the corporation was simply his alter ego and a sham through which he perpetrated a fraud upon the maritime community and worked an injustice upon the injured tort claimants. The District Court and Court of Appeals concurred in the determination that the maritime disaster was caused by negligence, but where the District Court found that the marine disaster occurred because of negligence and misconduct of both the individual and the corporation, the Court of Appeals found only against the corporation. It sustained the lower court in its determination that the

negligence was chargeable to the corporation but found facts at variance with the findings of the District Court to such an extent to permit it to conclude that there was no responsibility for the marine disaster on the part of Charles Zubik, Sr., either from the standpoint of his personal participation in the events preceding the marine disaster or as the alter ego of the corporation itself. The judgments of the District Court were therefore sustained in part and reversed in part.

The determination of the Court of Appeals is, in its particular aspects presented here, a matter of such importance and far reaching application to the maritime community that review by this Court is imperative.

Evidence for the Petitioners

The damage to the personal property and marine equipment of the Petitioners occurred early in the morning of March 6, 1964 when, in the course of a flood condition on the Allegheny River, a flotilla of barges broke loose from the 16th Street landing owned by Charles Zubik, Sr. and drifted downstream, breaking away and damaging the maritime equipment of the Petitioners. The maritime equipment of two of the Petitioners, Beaver and Thornton, which was directly involved, were the very houseboats in which they lived: Thornton's was damaged and Beaver's was destroyed.

With regard to the personal participation and direct responsibility of Charles Zubik, Sr., the record is clear. He was familiar with the way the barges were secured and he had the last word on these matters (162a, 207a). The day before the ice and high waters came down the river, Charles Zubik sat and watched his men tie up the barges at the landing (207a). In fact, he personally went to the

16th Street landing to observe the work every day for three or four days before the barges broke loose (208a). He also personally went to the landing at about 3:00 A. M. in the morning of March 6, 1964, just several hours before the disaster, in order to inspect the barges and to check the watchmen (868a, 875a-876a). The Zubiks conceded in their reply brief in the Court of Appeals that Charles Zubik was the chief executive officer, that he had final authority if any issue of properly securing the barges had arisen, and that he took no steps to correct what both the District Court and Court of Appeals agreed was negligently done.

With regard to the proposition that the corporate veil should be pierced in this case, the evidence shows that Charles Zubik purportedly leased marine equipment to the corporation originally for $5,000 per month and later for $8,500 per month. Yet he did not know whether the corporation ever made such payments to him or not. The corporation itself never declared a dividend. In all matters, Charles Zubik, Sr., had the last word. He owned all of the marine equipment involved and the corporation owned nothing.*

If Charles Zubik wished to buy any marine equipment, he took the money from the corporation and bought it, and then purportedly leased it to the corporation. The corporation was truly an operating company for the equipment of Charles Zubik which he leased to the corporation. The so called corporate rentals of equipment for a fiscal year were actually determined by the family at a meeting rather than being fixed by a formal agreement between the two contracting parties. There were no regular corporate

* He also owned a cement business, including a fleet of cement trucks, which the corporation purportedly operated for him under lease. There never was any written agreement concerning the operation of the cement business. No effort was made to legally separate the marine and cement business.

meetings held in 1961, 1962, 1963 and 1965. The corporation did not actually pay Charles Zubik either salary or rental but rather purported to give him a credit on the books from which credit his personal bills were to be paid. The corporation used all of Charles Zubik's equipment but the corporation was never quite sure what equipment it had or did not have from day to day. The corporation used his personal income tax depreciation schedule instead of a regular inventory. But no actual list of equipment was ever kept.

The corporation only recorded a profit during one year of its entire operation. The corporation never paid to Charles Zubik the alleged salaries and rentals but rather simply credited his account. The corporation would sell Charles Zubik's barges, have the checks issued to it and credit the amounts to the account of Charles Zubik. Charles Zubik had barges sold on bills of sale to the corporation which in turn made bills of sale to him personally but kept the barges. Charles Zubik would not buy vessels until he found out how much money the corporation had and if he could afford it. He borrowed money for the use of the corporation. The proceeds from sales of the equipment owned by Charles Zubik would be applied by the corporation to maintain and repair other leased equipment in its possession. Charles Zubik kept all his personal money in the corporation which operated upon his personal money so far as acquisition of vessels and supplies was concerned.

Checks payable to Charles Zubik were deposited in the corporation's bank account. The money was used to pay all the corporation's bills. The corporation in turn acted as a bank for Charles Zubik. The corporation kept all the records, notes and deeds of Charles Zubik. Shares of

stock in the corporation that were not held by Charles Zubik were issued as outright gifts to his children by him for no consideration. At least one of his children was not aware for a considerable period of time that any shares had been issued to him at all. At the time of the casualty, Charles, Sr. had 252 out of 283 outstanding shares of stock (433a, 434a, 436a). When the secretary-treasurer, his daughter, endorsed and delivered her stock to the attorney, she did not know whether the attorney was acting for her father or the corporation. The corporation leased and paid rentals on vessels purchased by Charles Zubik which it never used. The corporation assumed the burden of being concerned about the market value for vessels that it could not use itself and proceeded to rent what it did not need as a result of considering itself to be in fact the owner of the vessels.

The corporation paid for the building of Charles Zubik, Sr.'s home, paid for his home furnishings and engaged in the regular practice of paying his grocery and utility bills as well as his taxes. The corporation's money was also used to purchase equipment for Charles Zubik personally. The vessels rentals were conveniently adjusted to reflect the amount of money the corporation was making (452a). Charles Zubik, Sr., was the only one who was authorized to sign corporate checks, and his daughter's authority to sign them was given by power of attorney from him rather than by any authority by the corporation.

Every check that Charles Zubik, Sr., received or paid went through the corporation's accounts. The accounts of Charles Zubik, Sr., and the corporation were both kept in the same books. Bills from real estate owned and rented by Charles Zubik, Sr., were paid into the corporation account and he never actually received checks for payment

of rental on the vessels. All real estate expenses personally owned by Charles Zubik, Sr., were paid by the corporation. If the corporation needed money, it was taken out of Charles Zubik's personal account.

It is very significant to note that the corporation carried no marine liability insurance after October 30, 1958, to protect the maritime community with whose members it dealt or came into contact with on any basis—such as tort victims. The corporation was operated without any significant assets so far as its dealings with the maritime community were concerned. As a matter of fact, most of the witnesses who testified stated that the corporation owned practically nothing. The District Court made its findings upon this record.

The Court of Appeals' Findings of Fact

In the face of evidence on the record clearly to the contrary, and contrary to the District Court's findings, the Court of Appeals made the following *factual* determinations:

The corporation was formed when Charles Zubik, Sr., became too ill to physically continue the business and wanted to turn it over to his children. The corporation borrowed money from Charles Zubik, Sr., and other stockholders. The corporation owned over $67,000 in assets (clearly unsupported by the evidence). Charles Zubik, Sr. owned very little that he did not lease. His credit account was carefully debited to reflect payments of all his personal expenses. He was paid his salary, rentals, and loans by having the corporation pay for his personal expenses. There were no funds which oscillated between Charles Zubik and his corporation. The children of Charles, Sr., served as active heads for the corporation.

The sons ran the business and asked only for advice from Charles, Sr. The Court of Appeals in overruling the District Court's *supported* findings of fact went so far as to hold that Charles, Sr. was only a "spectator" when in fact he ran the business with an iron hand. The children even returned their stock in the corporation but the reason does not appear on the record.

The court in finding some of these facts says that they were supported by uncontradicted evidence. This was a direct violation of the right and duty of the trier of facts to weigh and reject evidence whether or not contradicted, and in violation of its own law and established rule laid down in *Johnson vs. Baltimore & Ohio Railroad Company,* 208 F. 2d 633 (3rd Cir. 1954). The court also found as a fact that there was *no reliance by the Petitioners* upon the actions of Charles, Sr. The court justified the conduct of Charles, Sr., on the ground that he was an old, illiterate, ill man, another factual proposition which the trial court did not accept.

Reasons for Allowance of the Writ

1. The Court of Appeals has decided a question of far reaching importance and application to federal law which has not been, but should be, settled by this court. This question is whether a federal court may place so great a burden upon injured and innocent tort litigants who seek to pierce a corporate veil (as the Court of Appeals has here) and, by so doing, effectively deny them the right to pierce the corporate fiction and prevent manifest injustice. The Court of Appeals has confined the right of a maritime tort litigant to pierce the corporate veil to those instances where the tort victims can prove expressly and specifically (1) that the corporation was formed deliberately

and with specific intent to escape liability for a specific tort or class of torts and (2) that the tort victim *relied* upon the corporation being more than a sham or mere operating company. It is quite obvious that one who has become the victim of a maritime disaster caused of the tortious misconduct of another has been afforded no opportunity to rely upon the person operating the sham corporation. He is in most cases, *as here,* simply an occupant of another part of the same harbor area. While there are no cases on this point in the maritime jurisdiction of the United States except the present decision of the court below, it is patently unjust to demand the fulfillment of such conditions and requirements which of necessity can *never* be fulfilled. Tort victims by their very nature simply have no opportunity to rely upon a sham corporation. The imposition of an impossible condition is not the imposition of a condition at all but rather constitutes the imposition of an absolute bar to an injured person. In commercial cases where reliance is involved, the persons involved have the opportunity to rely or not rely upon, to deal or not to deal with, the person inflicting the injury or wrong. In a tort case, as here, that can never be the case at all. The Petitioners had no choice but to be exposed to the risk that was created by Charles Zubik, Sr., and hope to survive if his conduct, that was beyond control, brought his flotilla down river upon them. It is an elementary proposition that an individual such as Charles Zubik, Sr., should not be permitted to operate in a large harbor area at the expense of everyone else in the habor simply by creating a worthless insolvent corporation as a buffer and shield between himself and an innocent maritime community.

2. The Court of Appeals in this case has so far departed from the accepted and usual course of judicial procedure

as sanctioned by this court as to call for the exercise of this court's power of supervision. Specifically, what the Court of Appeals did was to try the case *de novo* on the issue of piercing the coporate veil (or disregarding the corporate fiction). This is in direct violation of this court's decisions in *McAllister vs. United States,* 348 U. S. 19, 75 S. Ct. 6, 99 L. Ed. 20 (1954); and *Guzman vs. Pichirilo,* 369 U. S. 698, 82 S. Ct. 1095, 8 L. Ed. 2d 205 (1962). The *McAllister* case involved a trial by a court, sitting without a jury, in admiralty, and the Court of Appeals on less evidence than presented here by the Petitioners, reversed the trial court. In turn, its judgment was reversed by this court.

The decision below which constituted a *de novo* trial of the particular factual issues on appeal seems to us so contrary to principals enunciated by this court that we would also urge this aspect of the case as a basis upon which your honorable court should issue a writ of certiorari to the court below. There is no questions that the case was tried *de novo* since many additional facts were found, as has been pointed out, that were contrary to the permissible facts which the District Court found from the record. This is in direct conflict of this court's position in the *United States vs. Yellow Cab Company,* 338 U. S. 338, 70 S. Ct. 177, 94 L. Ed. 150 (1949). It is contrary to the rule followed by the First Circuit: *Evans vs. United States,* 319 F. 2d 751 (1st Cir. 1963); the Fifth Circuit: *National Surety Corporation vs. Musgrove,* 310 F. 2d 256 (5th Cir. 1962); the Sixth Circuit: *United States vs. Board of Education,* 332 F. 2d 40 (6th Cir. 1964); the Eighth Circuit: *Chicago, Burlington & Quincy Railroad Company vs. Veninger,* 373 F. 2d 854 (8th Cir. 1967); and finally, it is also contrary to the position of the Ninth Cir-

cuit: *Los Angeles Extension Co. vs. United States*, 315 F. 2d 1 (9th Cir. 1963). Each one of these circuits has one or more decisions which enunciates this principle. The United States Court of Appeals for the Third Circuit is the *only* circuit which still believes that it has the power and authority to try a case *de novo*. The Court of Appeals disregarded the portions of the record most favorable to the Petitioners and made new findings of its own without seeing or hearing witnesses.* The specific findings made are summarized above.

The court should also note that the corporation has been insolvent for some time and is presently in a state receivership proceeding in the Court of Common Pleas of Allegheny County, Pennsylvania. While Charles Zubik, Sr., owned extensive assets, the corporation never did—as has been clearly established by the District Court. The Petitioners have therefore been left by the Court of Appeals with totally worthless judgments against the corporation.* The record clearly justifies the District Court's finding of intentional and complete financial irresponsibility on the part of the corporation at the expense of the maritime community, and specifically your Petitioners.

The Court of Appeals also went out of its way to determine that the children of Charles Zubik, Sr., served as active heads of the corporation whereas the record is replete with evidence, and the District Court so found, that Charles Zubik, Sr., controlled and dominated all aspects of the corporation's activities, had the final word on all matters relating to both his and the corporation's affairs, and ran the corporation with an iron hand. In the very

* The Court of Appeals, for example, accepted one item of evidence which indicated that the corporation owned $67,000 in assets when the evidence from all other sources, which the District Court accepted, was that the corporation owned practically nothing whatsoever.

material aspects of this crucial issue in the case, the Court of Appeals simply substituted its own findings of fact for those of the District Court even though the findings of the District Court were supported by the evidence. The Court of Appeals attempted to justify and explain away the conduct of Charles Zubik, Sr., on the grounds that he was an old, illiterate, ill man, a proposition that was not accepted by the trial court* and not supported by the record (except by self-serving testimony). It was clear to the trial court that observed the witnesses and heard the testimony first hand that the testimony that the Court of Appeals accepted as fact was simply incredible and not worthy of belief. The United States Court of Appeals for the Third Circuit in so acting violated the very rule that it stated was so "elementary" in its opinion in *Petition of J. E. Brenneman Co.*, 322 F. 2d 846, 852 (3rd Cir. 1963).

CONCLUSION

For the foregoing reasons we respectfully submit that this Petition for Writ of Certiorari should be granted.

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* Note particularly here the factual statement of Charles Zubik, Sr., through his counsel, as appear in the first paper in the certified record from the Court of Appeals entitled "Motion and Order For Stay Pending Appeal Upon Filing Own Recognizance" wherein, on p. 5 thereof (paragraphs 9a and 9b), it is stated that his real estate net worth was approximately $200,000 and that he held certain maritime equipment, among which were eleven vessels worth more than $650,000 (the relevant excerpt therefrom being printed in Appendix E hereto).

APPENDICES

Appendix A

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

HARRY C. ZUBIK and LORRAINE F. ZUBIK, his wife, and HARRY ZUBIK COMPANY, INC.,
v.
CHARLES ZUBIK, individually, and CHARLES ZUBIK & SONS, INC.

Admiralty No. 64-35

LAWRENCE W. BEAVER,
v.
CHARLES ZUBIK, individually, and CHARLES ZUBIK & SONS, INC.

Admiralty No. 64-39

JAMES H. HALEY,
v.
CHARLES ZUBIK, individually, and CHARLES ZUBIK & SONS, INC.

Admiralty No. 64-40

CHARLES THORNTON,
v.
CHARLES ZUBIK, individually, and CHARLES ZUBIK & SONS, INC.

Admiralty No. 64-41

ELMER P. GRIMM,
v.
CHARLES ZUBIK, individually, and CHARLES ZUBIK & SONS, INC.

Admiralty Nos. 64-42, 64-45, 64-46, 64-47, 64-48

BURTON E. SQUIRES,
v.
CHARLES ZUBIK, individually, and CHARLES ZUBIK & SONS, INC.

Admiralty No. 64-49

In the Matter
of
Petition of CHARLES ZUBIK & SONS, INC., for exoneration from liability.

Admiralty No. 64-50

In the Matter
of
Petition of CHARLES ZUBIK, individually, for exoneration from or limitation of liability.

Admiralty No. 64-51

OPINION.

WALLACE S. GOURLEY, Chief Judge

These proceedings involve multiple actions in admiralty for damages to personal property and equipment of the claimants.

Several vessels and marine equipment broke loose from their moorings in adverse weather conditions which caused damages to the property or equipment of the respective claimants.

A most substantial factual dispute exists as to whether the conditions which arose were caused by negligence or due to an Act of God, an inevitable accident, or *vis major*.

The Court conducted full and complete hearings as to liability, and by agreement of counsel and with Court approval, the damage aspect of the proceedings was referred to a Master.

A most exhaustive and meticulous review has been made of the records before the Court and the Master's most detailed and thorough Findings of Fact and Conclusions of Law.

Where vessels and marine equipment are improperly moored and the owners have knowledge of impending adverse weather conditions and do not take precautions which are reasonably available, a failure to so act constitutes negligence and creates liability.

In order to sustain a defense on the basis of inevitable accident or *vis major*, the burden of proof is heavy. There must be no intervening act of negligence on the part of the alleged tortfeasor, or it must be established that the events were the result of inevitable circumstances which human effort, precaution and display of nautical skill could not have prevented.

Originally, the corporate and individual defendant presented petitions for exoneration from or limitation of liability. At the time of trial, the corporate defendant withdrew said petition, but the question remains as to whether

or not the individual defendant is entitled to the application of said doctrine.

The individual defendant, under all the circumstances, is not entitled to the application of either exoneration from or limitation of liability. The conclusion is inescapable that the marine equipment and vessels were improperly moored and secured under the circumstances known or which could have been reasonably anticipated. Said equipment protruded too far from the shoreline into the river bed and channel under the circumstances.

Furthermore, awareness of the unusual and inclement weather conditions were known far enough in advance for more appropriate precautions to be applied, and safer berths for the moorage of the marine equipment was available. Vessels of no other persons broke loose from their moorings.

The thesis that the individual defendant cannot be held responsible for the tortious or negligent course of conduct cannot be sustained. The corporate defendant is nothing more than the alter-ego of the individual defendant. In addition, there is a direct privity between the representatives, officers, directors and employees of the corporate defendant and individual defendant for the maintenance and control of the vessels and marine equipment involved.

All of the individual defendant's finances, activities, operation of the corporation business were intertwined with that of the corporation. The overwhelming weight of the evidence indicates that there is no demarcation between the individual and corporate defendants.

FINDINGS OF FACT.

A. *The Limitation of Liability Case as to Charles Zubik & Sons, Inc.*

The Limitation of Liability case as to Charles Zubik & Sons, Inc., was abandoned by the proctor for the corporation.

B. *Limitation of Liability as to Charles Zubik, individually.*

1. The corporation was purely an operating company for the equipment of Charles Zubik which he leased to the company for a set sum per month, although he was without knowledge as to whether or not the corporation paid him individually such sums.

2. Charles Zubik owned all of the marine equipment and the corporation was merely an operating company for such equipment which was leased by Charles Zubik.

3. There was no actual list of equipment kept, and the corporation used Charles Zubik's depreciation schedule instead of a regular inventory, the depreciation schedule being the one attached to his annual income tax return.

4. Said individual defendant kept all of his personal money in the corporation and the corporation did not actually pay Charles Zubik either salary or rental, but rather gave him a credit on his books from which credit his personal bills would be paid.

5. The corporation carries the Charles Zubik credit account as a liability account of the corporation, and all money that Charles Zubik receives or pays goes through the corporation account.

6. The corporation paid all of Charles Zubik's personal expenses, including home furnishings, grocery bills, utility bills and real estate expenses and income tax. Said tax returns and records upon which returns were made did not reflect any actual cash payment relationship between the corporation and Charles Zubik individually.

7. Charles Zubik is the only one authorized to sign corporate checks other than by power of attorney given by him to his daughter to sign his name. The daughter maintains both his personal and corporate books.

8. When the corporation needed money, it was taken out of the Charles Zubik personal account and put in the corporation account, and conversely, when Charles Zubik needed money, it was taken out of the corporation account to pay his personal expenses, including equipment, real estate, etc. As a matter of fact, the account book containing cash disbursements and cash receipts for Charles Zubik was continued for the corporation, the only change in the books being a change of name at the top of the book.

9. The corporation sold barges, had the vehicles issued to them and then credited the amounts to the account of Charles Zubik. The barges would be sold on bills of sale to the corporation which, in turn, made bills of sale to Charles Zubik personally. The proceeds of such sales owned by Charles Zubik would be applied by the corporation to maintain and repair other leased equipment in its possession.

10. There were no regular corporate meetings held in 1961, 1962, 1963 or 1965, and no dividend had ever been declared by the company. The shares of stock in the corporation were issued as outright gifts to the children in the amount of 31 shares a piece, and at least one of the stock-

holders was never aware that shares had been issued to him.

11. Charles Zubik exercised his own discretion as to the determination of salaries for himself and the other members of the family.

12. Charles Zubik, who has always been President and Chairman of the Board, and Donald Zubik, a son of Charles, and Managing Agent of the corporation, were both at the Sixteenth Street landing on the Allegheny River shortly before the fleet of barges broke loose.

13. During and throughout the period preceding the accident, Charles Zubik was always within the immediate area along the North Bank of the Allegheny River.

C. *Facts Relating to Liability of Charles Zubik and Charles Zubik & Sons, Inc.*

1. The fleet in question was, during the early morning hours of March 6, 1964, secured at the Zubik's Sixteenth Street landing on the Allegheny River in Pittsburgh, Pennsylvania, by means of chains, ropes and steel wires to the shore line. The ropes, wires and chains were fastened to the barges by being attached to the timberheads, cavels and similar parts of the barges built as a part of the barge for the specific purpose of fastening lines and securing the barges.

2. The barges were so tied and secured that when strain was asserted on the lines, two of the timberheads pulled out thereby placing great strain on two other lines.

3. Charles Zubik and Charles Zubik & Sons, Inc., knew that if one timberhead lets go, the entire fleet will break loose because of the additional strain on the other lines.

4. The barges were protruding too far into the river for existing circumstances as the river current near the shore was substantially less than that towards the center of the river. The fleet extended 150 to 160 feet out into the river. Within 100 feet of the bank, the speed of the river was about four miles per hour.

5. It was suggested to the petitioners that all or part of the fleet be removed to the Monongahela River so as to avoid the Allegheny which was rising all night prior to the accident. The petitioners knew of the impending flood waters for several days prior to the time the barges broke loose. It is permissible for marine equipment to be moved on the river without any authorization from the corps of engineers.

6. The entire fleet broke loose between 5:00 a.m. and 6:00 a.m. on March 6, 1964, and the full ice did not come into the Sixteenth Street area until about 6:30 a.m. on March 6, 1964.

7. The fleet of barges was loaded to varying degrees but the entire fleet weight was approximately 11,000 to 12,000 tons.

8. The first landing downstream on the Allegheny River was the Slepski landing. The Slepski landing boat was struck on her bow by the Zubik fleet and was driven to her starboard out into the Allegheny River. As the Slepski vessel was torn loose from her moorings, she struck and broke loose all of the Beaver vessels and docks which were a very short distance below the Slepski landing.

9. As the Slepski vessel was driven downstream, she struck the M/V Pete owned by Haley, driving her into the shore, damaging the vessel and other equipment.

10. As the Slepski vessel was driven downstream, it struck and destroyed certain equipment and facilities owned by Thornton which was approximately 200 feet below the Haley landing.

11. As the Zubik barges proceeded downstream, they struck the bridge pier of the 11th Street Bridge, breaking apart into smaller groups and continuing to float downstream.

12. Some of the loaded Zubik barges then rammed the Grimm fleet, which was located immediately below the piers of the 11th Street Bridge, sweeping the entire flotilla into the river.

13. The M/V Sheryl Ann on which Grimm was stationed was struck by a number of Zubik vessels and was finally rammed by the Zubik Sanddigger as she came off a pier at the Manchester Bridge and ultimately sunk in the Ohio River.

14. The Grimm northwest crane barge was sunk in the back channel of the Ohio River.

15. The Squires cabin cruiser which was moored to the shore of the Allegheny just below the 7th Street Bridge sank in the Allegheny.

16. Because of the sudden emergency created by the collisions, Beaver, Haley, Thornton and Amelia were forced to abandon their vessels and proceed to shore. These parties were not impeded by the ice in proceeding to shore.

17. No vessels which were moored up river from the Zubik landing at Sixteenth Street on the Allegheny River broke loose, including their own vessels at the Heinz landing.

CONCLUSIONS OF LAW.

1. Charles Zubik is, for all practical purposes, the real owner and operator of Charles Zubik & Sons, Inc., and has so intertwined, confused and joined his personal activities with that of his corporation that he is not entitled to rely upon the corporate fiction of Charles Zubik & Sons, Inc., and establish it as a separate identity so as not to be charged with its negligent acts.

2. Whether or not the corporate fiction is disregarded, Charles Zubik and Charles Zubik & Sons, Inc., were negligent in the stationing, mooring and securing of the barges at the Sixteenth Street landing.

3. Charles Zubik & Sons, Inc., so tied up the fleet at Sixteenth Street as to place stress on timberheads of the barges.

4. Whether or not the corporate fiction is disregarded, Charles Zubik so permitted the fleet at the Sixteenth Street landing to be secured as to place stress on timberheads of the barges.

5. The negligence of Charles Zubik & Sons, Inc., and Charles Zubik was the proximate cause of all losses sustained by Beaver, Haley, Thornton, Grimm and Squires.

6. Charles Zubik & Sons, Inc., is not entitled to limit its liability because of the privity or knowledge of the managerial employees and officers to the facts and circumstances surrounding the matters giving rise to this litigation.

7. Charles Zubik is not entitled to limit his liability because of his privity to or knowledge of the facts and circumstances surrounding the matters giving rise to this litigation both as an individual and as a corporate officer.

8. The barges at the Sixteenth Street landing were owned and under the control of Charles Zubik & Sons, Inc., and were not under lease to Charles Zubik & Sons, Inc., at the time of the breakaway.

9. Because of disregarding of the corporate fiction and the holding that Charles Zubik and Charles Zubik & Sons, Inc., are one and the same, no alleged oral lease between the two has any legal significance.

10. Charles Zubik is personally liable to Beaver, Haley, Thornton, Grimm and Squires for all losses sustained by them when the Zubik barges broke away from the Sixteenth Street landing on March 6, 1964, and destroyed or damaged their marine equipment secured downstream from the Zubik Sixteenth Street fleet.

11. Charles Zubik & Sons, Inc., is liable to Beaver, Haley, Thornton, Grimm and Squires for all losses sustained by them when the Zubik barges broke away from the Sixteenth Street landing on March 6, 1964, and destroyed or damaged their marine equipment secured downstream.

DAMAGES.

In the administration of this proceeding, in view of the many complex issues as to damages and the multiple claims which existed, twelve (12) in number, it was the consensus of counsel and the judgment of the Court, that justice would be materially expedited and the interests of counsel best served by the appointment of a special Master to hear and adjudicate each Damage claim. In fact, petition was filed by counsel for the defendants requesting the Court to appoint a special Master to determine Damages.

Consistent with the provisions of Rule 53(b) of the Federal Rules of Civil Procedure, and the determination by

the Court that exceptional circumstances and conditions existed, the Court appointed John V. Bowser, Esq., as Special Master. Attorney Bowser is a certified public accountant and a former Vice President and Comptroller of Westinghouse Air Brake; former Executive Director of the Securities and Exchange Commission of the United States of America, a successful investor, a most experienced member of the bar in bankruptcy and reorganization matters, and generally, a most successful member of the bar and trial advocate.

The use of the services of John V. Bowser, Esq., as Special Master to determine the damages sustained by each of the claimants unquestionably simplified the trial and afforded counsel for the respective multiple parties much more time and opportunity to thoroughly present their client's causes. It was stated by counsel for all the parties that this procedure would be much more satisfactory and convenient to all concerned. This practice and procedure has been recommended to the District Courts within the Third Judicial Circuit in cases within the category of complicated and intricate matters which involve a welter of figures and disputed claims as to money damages. *Wilson v. Homestead Valve Manufacturing Co.*, 217 F. 2d 792, 800 (3rd Cir., 1954), cert. den. 349 U. S. 916.

In reference to a Master, the applicable provisions of Rule 53 provide:

> (1) Contents and Filing. The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. * * * in an action to be tried without a jury, unless otherwise directed by the order of reference, (the master) shall file with

it a transcript of the proceedings and of the evidence and the original exhibits.

(2) In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. * * * any party may serve written objections thereto * * *. Application to the court for action upon the report and upon objections thereto shall be by motion * * *. The court, after hearing, may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(4) Stipulation as to Findings. The effect of a master's report is the same whether or not the parties have consented to the reference; but when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

The Special Master has complied in all respects with the duties and responsibilities of his trust and appointment. Full, complete and exhaustive hearings were held for six days, the transcript of the hearings comprises 690 pages of testimony and numerous exhibits.

Under the special order of reference, the Master's Findings, Conclusions and Report are not final and conclusive. Where a Special Master is appointed, the Findings of Fact, Conclusions of Law and Report are merely advisory and require confirmation by the Court. *In re Mifflin Chemical Corporation,* 123 F. 2d 311 (3rd Cir., 1941); *D. M. W. Contracting Co. v. Stoltz,* 158 F. 2d 405 (D. C., 1946).

The Court has read, evaluated and considered in a most meticulous and careful manner the full and complete rec-

ord and Report of the Master. No useful purpose could be gained through oral argument of counsel. Suffice to say, substantial evidence exists in the most voluminous record to support the recommendations, Findings, Conclusions and Report of the Special Master.

The Report of the Master is confirmed and approved and the Court enters the following Findings of Fact and Conclusions of Law:

HARRY C. ZUBIK and LORRAINE F. ZUBIK, his wife, and HARRY ZUBIK COMPANY, INC.

v.

CHARLES ZUBIK, individually, and CHARLES ZUBIK & SONS, INC.

No. 64-35 in Admiralty

FINDINGS OF FACT.

1. The libellants in this proceeding sustained damage and loss to one sand and gravel dredge, damage to a vessel known as the M/V DALE Z, loss of two four-inch pumps and hoses, cost of repairs, and miscellaneous equipment as a proximate result of the negligence of the defendants.

2. The libellants did not prove, consistent with the rule of law to be applied in matters of this nature, loss of business profits as a proximate result of the negligence of the defendants.

3. *Dredge Boat #5:* A substantial dispute existed between the parties as to the fair, reasonable value of Dredge

Boat #5, known as a sand and gravel dredge. The fair, reasonable market value of Dredge Boat #5 on the date of the accident was $80,000 and said vessel, as a result of its sinking, was a total loss and only had scrap value after the accident. An award of $80,000 as compensation gives fair and reasonable compensation for the scrap value of said vessel.

4. *M/V DALE Z:* A substantial dispute existed between the parties as to the fair, reasonable market value of said vessel prior to the accident. The appraised fair, reasonable market value of the M/V DALE Z prior to the accident was $16,000, and after the vessel was raised, it was a total loss, the scrap value being $4,000. The damages sustained by libellants for the loss of the M/V DALE Z are $12,000.

5. *M/V LITTLE CHARLIE:* This vessel was damaged and two pumps on the vessel and a hose were also damaged. A substantial dispute existed between the parties as to the fair, reasonable amount or cost for the repairs to said vessel, the value of the two pumps on the vessel and the value of the hose which were damaged, The libellants sustained damages in the amount of $500.00 for the cost of the repairs to said vessel, the fair, reasonable value of the two pumps was $800.00, and the value of the hose $300.00, or the total damages for the cost of repairs to the vessel, the loss of the two pumps and the hose were $1,600.

6. *Landing Boat WILLIAM WHIGHAM:* The libellants failed to establish by the burden of proof required under the law any damages to this vessel, and the Court concludes that the libellants are not entitled to any award for damages to the Landing Boat WILLIAM WHIGHAM.

7. *Loss of Profits:* A substantial dispute existed between the parties as to whether any profits were lost as a

result of the damage to the vessels and equipment of the libellants. The libellants have not established by the burden of proof required under the law that any proceeds were lost as a result of the damage to the vessels and equipment due to the tortious conduct of the defendants, except as to Dredge Boat #5. Substantial dispute exists in the record that the libellants suffered a financial loss as a result of the sinking of the vessel Dredge Boat #5. The damages sustained by libellants as a result of the loss of use of Dredge Boat #5 were in the amount of $9,840.

CONCLUSIONS OF LAW.

1. *Dredge Boat #5:* Damages were sustained by libellants in the amount of $80,000 as a result of the loss of said vessel as a proximate result of the negligence of the defendants.

2. *M/V DALE Z:* Damages were sustained as a result of the damage to the vessel M/V DALE Z in the amount of $12,000 as a proximate result of the negligence of the defendant.

3. *M/V LITTLE CHARLIE:* Damages were sustained to the M/V LITTLE CHARLIE, and for the loss of two pumps and a hose on said vessel in the amount of $1,600 as a proximate result of the negligence of the defendants.

4. *Landing Boat WILLIAM WHIGHAM:* No damages have been proved to have been sustained to the Landing Boat WILLIAM WHIGHAM as a proximate result of the negligence of the defendants.

5. *Loss of Profits:* Proceeds for the loss of the use of Dredge Boat #5 in the amount of $9,840.

6. No other damages were sustained by other vessels or equipment of the libellants as a proximate result of the negligence of the defendants.

7. Total damages were sustained by libellants due to the tortious conduct of the defendants in the amount of $103,440.

8. The libellants are entitled to judgment against the defendants as a result of the tortious conduct of the defendants in the amount of $103,440.

LAWRENCE W. BEAVER,

v.

CHARLES ZUBIK, individually, and CHARLES ZUBIK & SONS, INC.

No. 64-39 in Admiralty

FINDINGS OF FACT.

1. A substantial dispute existed between the parties as to the value and loss of one houseboat, ten motor boats, damage to docking facilities and loss of business profits.

2. The libellant has not established, in accordance with the proof required by law, any loss of profits as a result of the damages to said vessels and docking facilities.

3. The libellant is entitled to damages in the amount of $3,600 as a proximate result of the tortious conduct of the defendants to the houseboat, motor boats, docking facilities.

CONCLUSIONS OF LAW.

The libellant is entitled to judgment against the defendants in the amount of $3,600 for damages sustained to ves-

sels, equipment and docks as a proximate result of the tortious conduct of the defendants.

JAMES H. HALEY,

v.

CHARLES ZUBIK, individually, and CHARLES ZUBIK & SONS, INC.

No. 64-40 in Admiralty

FINDINGS OF FACT.

1. A substantial dispute existed between the parties as to the damages sustained by libellants to a landing barge and rigging, and damages to the M/V PETE.

2. The libellant sustained damages to the vessel M/V PETE in the amount of $1,500 and damages to a landing barge in the amount of $1,250.

CONCLUSIONS OF LAW.

The libellant is entitled to damages in the amount of $2,750 against defendants for damages sustained to the M/V PETE and a landing barge as a proximate result of the tortious conduct of the defendants.

CHARLES THORNTON,

v.

CHARLES ZUBIK, individually, and CHARLES ZUBIK & SONS, INC.

No. 64-41 in Admiralty

FINDINGS OF FACT.

1. A substantial dispute existed between the parties as to the damages sustained by the libellant to docking and boating facilities, and loss of business profits.

2. The libellant has not established consistent with the burden of proof required by law, loss of profits as a proximate result of the tortious conduct of the defendants to the houseboat, docks and boating facilities.

3. The libellant has been damaged in the amount of $1,750 for damages to the houseboat, docks and boating facilities.

CONCLUSIONS OF LAW.

The libellant is entitled to judgment in the amount of $1,750 for damages sustained as the proximate result of the tortious conduct of the defendants to the houseboat, docks and boating facilities of the libellant.

ELMER P. GRIMM,

v.

CHARLES ZUBIK, individually, and CHARLES ZUBIK & SONS, INC.

No. 64-42 in Admiralty

FINDINGS OF FACT

1. A substantial dispute existed between the parties as to the damages sustained by the libellant in connection with the sinking of the M/V CHERYL ANN, salvage expenses and loss of business profits.

2. The fair, reasonable market value of the M/V CHERYL ANN immediately prior to the accident was $42,500. The fair, reasonable cost of the repairs to said vessel was in the amount of $40,000, which amount was agreed and stipulated to by the parties. The libellant is entitled to damages as a proximate result of the tortious conduct of the defendant in the amount of $40,000 for the cost of the repairs to the M/V CHERYL ANN.

3. It was necessary, as a proximate result of the tortious conduct of the defendants, for the libellant to salvage the M/V CHERYL ANN at a cost of $10,600.

4. The libellant is entitled to damages in the amount of $2,500 as a result of the tortious conduct of defendants for damages sustained to furniture, tackle, spare parts and other appurtenances on the M/V CHERYL ANN.

5. The libellant sustained a loss of income in the amount of $6,600 as a proximate result of the loss of use of the M/V CHERYL ANN, the Northwest Crane Barge, the "C" Crane Barge, and the M/V CIS-5.

CONCLUSIONS OF LAW.

As a proximate result of the tortious conduct of the defendants, damages were sustained to the M/V CHERYL ANN in the amount of $40,000; the cost of salvage to the M/V CHERYL ANN in the amount of $10,600; damages to furniture, tackle, spare parts and equipment on said vessel in the amount of $2,500; and loss of income as a result of the loss of the use of the M/V CHERYL ANN, the Northwest Crane Barge, the "C" Crane Barge, and the M/V CIS-5 in the amount of $6,600, or total damages in the amount of $59,700.

ELMER P. GRIMM,

v.

CHARLES ZUBIK, individually, and CHARLES ZUBIK & SONS, INC.

No. 64-45 in Admiralty

FINDINGS OF FACT.

The libellant sustained damages to the M/V CIS-5 in the amount of $4,500 as a proximate result of the tortious conduct of the defendants.

CONCLUSIONS OF LAW.

The parties have stipulated that if a right to recover exists, the damages to the M/V CIS-5 as a proximate result of the tortious conduct of the defendants was in the amount of $4,500. The libellant is therefore entitled to judgment in the amount of $4,500 against defendants.

ELMER P. GRIMM,

v.

CHARLES ZUBIK, individually, and CHARLES ZUBIK & SONS, INC.

No. 64-46 in Admiralty

FINDINGS OF FACT.

The damages to the Northwest Crane Barge as a proximate result of the tortious conduct of the defendants was $11,000 and the loss of the cargo on said vessel was $1,500.

CONCLUSIONS OF LAW.

Libellant is entitled to damages against defendants as a proximate result of the tortious conduct of the defendants for damage to the Northwest Crane Barge and loss of the cargo in the amount of $12,500.

ELMER P. GRIMM,

v.

CHARLES ZUBIK, individually, and CHARLES ZUBIK & SONS, INC.

No. 64-47 in Admiralty

FINDINGS OF FACT.

The libellant sustained damages to the vessel "C" Crane Barge, including cargo loss, as a proximate result of the tortious conduct of the defendants in the amount of $3,300.

CONCLUSIONS OF LAW.

The libellant is entitled to judgment against the defendants in the amount of $3,300 for damage to the vessel "C" Crane Barge and the cargo thereon.

ELMER P. GRIMM,

v.

CHARLES ZUBIK, individually, and CHARLES ZUBIK & SONS, INC.

No. 64-48 in Admiralty

FINDINGS OF FACT.

The damages of the libellant to three half barges, including cargo loss, as a proximate result of the tortious conduct of the defendants was $3,500.

CONCLUSIONS OF LAW.

Libellant is entitled to judgment in the amount of $3,500 as compensation for the damages to three half barges and the cargo.

BURTON E. SQUIRES,

v.

CHARLES ZUBIK, individually, and CHARLES ZUBIK & SONS, INC.

No. 64-49 in Admiralty.

FINDINGS OF FACT.

The libellant sustained damages to his motor vessel, including furnishings, as a proximate result of the tortious conduct of the defendants, in the amount of $12,500.

CONCLUSIONS OF LAW.

Libellant is entitled to judgment against the defendants in the amount of $12,500 for damages to his motor vessel and furnishings thereon.

It is also proper to tax the Master's fee, the Court Reporting fees, and the reproduction of the Master's Findings of Fact and Conclusions of Law, in view of the multiple actions consolidated for trial, as costs to be taxed against the defendants. *Wilson v. Homestead Valve Manufacturing Co., supra.*

An appropriate Order is entered.

ORDER.

AND NOW, THIS 12th day of April, 1966, in accordance with the Findings of Fact and Conclusions of Law set forth herein, judgment is entered as follows:

No. 64-35 in Admiralty

In favor of the libellants, Harry C. Zubik and Lorraine F. Zubik, his wife, and Harry Zubik Company, Inc., and against the defendants, Charles Zubik, individually, and Charles Zubik & Sons, Inc., in the amount of $103,440.

No. 64-39 in Admiralty

In favor of libellant, Lawrence W. Beaver, and against the defendants, Charles Zubik, individually, and Charles Zubik & Sons, Inc., in the amount of $3,600.

No. 64-40 in Admiralty

In favor of libellant, James H. Haley, and against the defendants, Charles Zubik, individually, and Charles Zubik & Sons, Inc., in the amount of $2,750.

No. 64-41 in Admiralty

In favor of libellant, Charles Thornton, and against the defendants, Charles Zubik, individually, and Charles Zubik & Sons, Inc., in the amount of $1,750.

No. 64-42 in Admiralty

In favor of libellant, Elmer P. Grimm, and against the defendants, Charles Zubik, individually, and Charles Zubik & Sons, Inc., in the amount of $59,700.

No. 64-45 in Admiralty

In favor of libellant, Elmer P. Grimm, and against the defendants, Charles Zubik, individually, and Charles Zubik & Sons, Inc., in the amount of $4,500.

No. 64-46 in Admiralty

In favor of libellant, Elmer P. Grimm, and against the defendants, Charles Zubik, individually, and Charles Zubik & Sons, Inc., in the amount of $12,500.

No. 64-47 in Admiralty

In favor of libellant, Elmer P. Grimm, and against the defendants, Charles Zubik, individually, and Charles Zubik & Sons, Inc., in the amount of $3,300.

No. 64-48 in Admiralty

In favor of libellant, Elmer P. Grimm, and against the defendants, Charles Zubik, individually, and Charles Zubik & Sons, Inc., in the amount of $3,500.

No. 64-49 in Admiralty

In favor of libellant, Burton E. Squires, and against the defendants, Charles Zubik, individually, and Charles Zubik & Sons, Inc., in the amount of $12,500.

No. 64-50 in Admiralty

Petition of Charles Zubik & Sons, Inc., for exoneration from or limitation of liability is denied, and the Clerk of Court is directed to enter judgment accordingly.

No. 64-51 in Admiralty

Petition of Charles Zubik, individually, for exoneration from or limitation of liability is denied, and the Clerk of Court is directed to enter judgment accordingly.

WALLACE S. GOURLEY, ESQ.,
Chief Judge.

cc: John V. Bowser, Master,
1130 Porter Building.

John D. Ray, Esq., for the Defendants,
Beaver, Pennsylvania.

James R. Fitzgerald, Esq., for Harry C. Zubik and Lorraine F. Zubik,
411 B. F. Jones Bldg.

Norman J. Cowie, Esq., for Lawrence W. Beaver, James H. Haley, Charles Thornton, and Elmer P. Grimm,
1524 Frick Building.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 15940 through 15948

HARRY C. ZUBIK AND LORRAINE F. ZUBIK, HIS WIFE, AND HARRY ZUBIK COMPANY, INC. (Appellees in No. 15940),

LAWRENCE W. BEAVER (Appellee in No. 15941),

JAMES H. HALEY (Appellee in No. 15942),

CHARLES THORNTON (Appellee in No. 15943),

ELMER P. GRIMM (Appellee in Nos. 15944 Through 15948),

v.

CHARLES ZUBIK, JR. AND VIRGINIA ZUBIK DRAMBEL, EXECUTORS OF THE ESTATE OF CHARLES ZUBIK, SR., AND CHARLES ZUBIK & SONS, INC. (Appellants in Nos 15940 Through 15948)

No. 15949

BURTON E. SQUIRES

v.

CHARLES ZUBIK & SONS, INC.,

Appellant.

No. 15950

IN THE MATTER OF PETITION OF CHARLES ZUBIK & SONS, INC., FOR EXONERATION FROM LIABILITY OR LIMITATION OF LIABILITY,

CHARLES ZUBIK & SONS, INC.,

Appellant.

No. 15951

IN THE MATTER OF PETITION OF CHARLES ZUBIK, INDIVIDUALLY, FOR EXONERATION FROM OR LIMITATION OF LIABILITY,

CHARLES ZUBIK, JR. AND VIRGINIA ZUBIK DRAMBEL, EXECUTORS OF THE ESTATE OF CHARLES ZUBIK, SR., *Appellants.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued June 20, 1967
Before KALODNER and HASTIE, *Circuit Judges*, and VAN DUSEN, *District Judge*

OPINION OF THE COURT

(Filed September 29, 1967)

By VAN DUSEN, *District Judge**

This consolidated appeal is from multiple judgments in admiralty entered in the District Court against Charles Zubik (Charles, Sr.), individually,** and Charles Zubik & Sons, Inc. (Zubik Corporation). The claimed damages to personal property and equipment occurred early on the morning of March 6, 1964, when an unusually large ice flow coming down the Allegheny River broke several of the appellants' sand and gravel barges from their moorings at the 16th Street landing in the City of Pittsburgh. The drifting vessels caused damage to the several appellees having a total value of $207,540.

* Subsequent to the oral argument, Judge Van Dusen was appointed a judge of the United States Court of Appeals for the Third Circuit.

** The executors of the estate of the original individual respondent have substituted for him in view of his death since the trial.

Appellants make three arguments: that the wrong test of negligence was used by the trial judge; that, even if the Zubik Corporation was liable, the court erred in disregarding the corporate entity and treating Charles, Sr. and Zubik Corporation as one and the same; and that, even if the Zubik Corporation was liable, the original individual respondent, Charles, Sr., was not personally liable for negligence in his own acts.

I.

On the issue of the liability of Zubik Corporation there is sufficient evidence to support the conclusion of the trial judge that the appellant did not sustain its "heavy" burden of proof. As the leading case in this Circuit sets forth, *Swenson v. The Argonaut,* 204 F. 2d 636 (3rd Cir. 1953), when a collision involves a vessel drifting loose from its moorings, the respondent must overcome a presumption of fault. And if the defense, as in this case, is "inevitable accident" or *vis major,* the respondent's burden includes proving freedom from negligence or inevitable circumstances unalterable by human effort, precaution, or proper nautical skill. *The Louisiana,* 3 Wall. 164 (1866); *Swenson v. The Argonaut, supra,* at 640. The record shows such sufficient evidence of warning of the ice flow, time to act to move some or all of the barges to safe waters, improper fastenings of some lines, and improper positioning of the fleet of barges that we cannot find the judgment below "clearly erroneous" or the result of a "mistake." *McAllister v. United States,* 348 U. S. 19 (1954); *Knox v. United States Lines Company,* 320 F. 2d 247, 249 (3rd Cir. 1963). We therefore affirm the trial court's finding of negligence as to Zubik Corporation (Conclusions of Law Nos. 2, 5 & 11).

II.

The issue of Charles Zubik, Sr.'s personal liability occupied a large part of the trial below. The trial judge's several findings of fact concerning the interrelation of Charles, Sr.'s personal affairs and the affairs of Zubik Corporation led him to the conclusion that:

> "The corporate defendant is nothing more than the alter ego of the individual defendant. . . . All of the defendant's finances, activities, operation of the corporation business were intertwined with that of the corporation. The overwhelming weight of the evidence indicates that there is no demarcation between the individual and corporate defendants." (1155-39a)

This conclusion of "lack of demarcation" or conclusion that the corporation was the "alter ego" of Charles, Sr. rested upon Findings of Fact concerning the Zubik business operation. In these Findings the trial judge stressed that Zubik Corporation was "purely an operating company" with records inadequate even to designate what property owned by Chrales, Sr. was leased to the corporation and at what rent. The intertwining of Charles, Sr.'s personal affairs with the corporation was inferred, particularly from the fact that all of his personal expenses were paid directly by the corporation with merely a bookkeeping entry against Charles, Sr.'s credit aecount. Emphasis was placed upon the fact that Charles, Sr. was the only one authorized to sign corporate checks, although, via a personal power of attorney, his daughter often signed for him. A disregard of the corporate formalities of meetings for some years, the use of oral leases of equipment from Charles, Sr. at fluctuating rentals, and the general "intertwining" of personal and corporate finances, relating to the sale of barges and the borrowing of money, provided additional "facts" from which the trial judge concluded that the corporate

"fiction" of Zubik Corporation could not be relied upon by Charles, Sr.[1]

Consideration of the record as a whole, however requires the conclusion that libellants did not sustain their burden of proving that the corporate entity should be disregarded.[2] An examination of the record has established that the additional facts summarized below are supported by uncontradicted evidence. Zubik Corporation was formed in 1948 on the advice of counsel when Charles, Sr. became too ill to continue physically in his business and when he wanted to let his children run the business he had created. Engaged primarily in the sand and gravel business, after 1957 the corporation expanded into the related field of producing concrete. In both businesses, the corporation paid its own expenses of operation, hired its own employees, paid their wages and made the various tax, social security, and unemployment payments. Although the corporation borrowed from Charles, Sr. on several ocasions it borrowed from other stockholders as well. The corporation kept records reflecting such loans.

Considerable testimony was heard concerning the leasing of barges and other assets owned by Charles, Sr. Although the bulk of the equipment used by Zubik Corporation was leased from Charles, Sr., some barges were leased from others and the corporation owned some assets of its own

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[1] Conclusion of Law 1 reads (1155-45a):

"Charles Zubik is for all practical purposes, the real owner and operator of Charles Zubik & Sons, Inc., and has so intertwined, confused and joined his personal activities with that of his corporation that he is not entitled to rely upon the corporate fiction of Charles Zubik & Sons, Inc., and establish it as a separate entity so as not to be charged with its negligent acts."

[2] Plaintiffs have "the burden of establishing, by a preponderance of the evidence, that the corporation was an artifice and a sham designed to execute illegitimate purposes in abuse of the corporate fiction and the immunity that it carries * * *." *Corvell v. Phipps*, 128 F. 2d 702, 704 (5th Cir. 1942), aff'd on other grounds, 317 U. S. 406 (1943); *In Re Sheridan's Petition*, 226 F. Supp. 136, 139 (S. D. N. Y. 1964).

(over $6[illegible]0. one witness testified) such as cement, gravel, sand, gasoline, tools and rope.[3] The great bulk of the "assets," however, were owned by Charles, Sr., including those used in the cement business, and leased in their entirety to Zubik Corporation. Charles, Sr. owned very little he did not lease. Some controversy existed over the financial arrangement of such leases from Charles, Sr.; however, all sides seem to agree that payments to Charles, Sr., including his salary, took the form of credits to his account with the company. Whether these payments and leases are characterized as "purported" or not (see appellees' brief, p. 26, Nos. 7, 11), Charles, Sr.'s credit account was carefully debited to reflect payment of all of Charles, Sr.'s personal expenses. In this fashion, Charles, Sr. was "paid" his salary, rental and loans, by having the corporation "pay" for his personal expenses. All of the evidence concerning the written and oral leases, as well as the bookkeeping and activities concerning sale, purchase, subletting, repairs, and maintenance of equipment, tended to show a possible lack of arm's-length dealing between Charles, Sr. and the corporation or a lack of some of the formal elements of a lessor-lessee relationship found outside a closely-held corporation.[4] This informality extended to the observance of corporate procedure as to meetings [no records of 1961

[3] Apparently the Internal Revenue Service did not allow many of these items to be carried as assets for tax purposes or as inventory.

[4] It is noted that lack of formalities in a closely-held or family corporation has often not been found to have as much consequence as where such a closely-held corporation is not involved, *e.g., Chambers v. Beaver-Advance Corp.*, 392 Pa. 481, 492, 140 A. 2d 808 (1958); *Sharon Herald Co. v. Granger*, 97 F. Supp. 295, 301 (W. D. Pa. 1951), aff'd on other grounds, 195 F. 2d 890 (3rd Cir. 1952). In the context of an attempt by an outside party to pierce the corporate veil of such a closely-held corporation, the informalities are considered of little consequence, *e.g., In re Sheridan's Petition*, 226 F. Supp. 136, 139 (S. D. N. Y. 1964); *Hellenic Lines, Limited v. Winkler*, 249 F. Supp. 771, 773, 776 (S. D. N. Y. 1966). Statutory personal liability of certain officer-shareholders of close corporations, regardless of observance of corporate formalities, has been suggested. See *Note, Should Shareholders Be Personally Liable For The Torts of Their Corporation*, 76 Yale L. J. 1190, 1196 ff. (1967).

through 1963] and as to expenses, oral renewals of leases, and alteration of rentals and salaries to reflect the success of operations. But there is no evidence that funds oscillated at will between Charles, Sr. and Zubik Corporation,[5] and the Internal Revenue Service apparently forced some uniformity, at least as to fair and consistent rentals.

Since the trial judge did not disbelieve or reject the testimony concerning oral leases of marine equipment,[6] it is difficult to understand his Conclusion of Law 8 that the barges which broke away "were not under lease" to Zubik Corporation "at the time of the breakaway." (1155-46a).

The Zubik family paid attention to the separate corporate entity of the closely-held Zubik family corporation in many respects. It was particularly required for tax purposes.[7] Members of the family were given shares of stock by their father[8] which he paid for in cash. The children served as officers of the corporation and also as its "active heads". In addition to the uncontradicted evidence of regular meetings of Zubik Corporation in years prior to 1961 and in 1964, there is testimony of corporate meetings during the years 1961-1963, even though no minutes were produced. Moreover, the separate corporate existence can-

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[5] See *Hellenic Lines, Limited v. Winkler, supra,* n. 4, at 776.

[6] Conclusion of Law 9 (1155-46a) recognizes "alleged oral lease[s]." Finding of Fact 1 (1155-40a) states that Charles, Sr. "leased [equipment] to the company for a set sum per month." Finding of Fact 2 states: "Charles Zubik [Sr.] owned all of the marine equipment and the corporation was merely an operating company for such equipment which was leased by Charles Zubik [Sr.]."

[7] The tax returns of Zubik Corporation were apparently often audited and the issue of rentals for marine equipment was eventually settled in the I. R. S. Appellate Division. Such problems with the I. R. S. caused the accountant and corporation to keep careful separation of Zubik Corporation and Charles, Sr.'s personal transactions and resulted in a requirement that the corporation maintain a fixed rental, unchangeable without Government approval.

[8] In 1948 Charles, Sr. owned 252 shares; by gift his eight children owned 31 shares each, or 248. From 1948 to 1964, Charles, Sr. was not even majority stockholder due to his further gift of 10 shares to his granddaughter. Early in 1964, some of the children returned their stock to the corporation's attorney, but the reason for this does not appear in the record.

not be denied merely because Charles, Sr. and the corporation had the same attorney or the same accountant. The fact that Charles, Sr.'s records and the corporate records were both kept by his daughter, the fact that the corporation kept his notes and deeds, or the fact that his daughter signed corporate checks pursuant to a personal power of attorney from Charles, Sr. seems irrelevant to the issue of separate corporate existence, particularly since Charles, Sr. could neither read nor write. Even if Charles, Sr. remained the "last word" within the corporation, his sons ran the business, asking their father only for his experienced advice. As to daily operations, Charles, Sr. was really a spectator, whether from the upper deck of their office boat or from his car on the river road. The fact that Charles, Sr. kept all his personal money in the corporation, Finding of Fact 4, seems adequately explained by the testimony that he sought to avoid government attachment, and that the corporation made money in only one year and, therefore, not only declared no dividends but was forced to "juggle the best way we know how to try to get along" (192a)[9]

Since business on the river was apparently filled with the constant threat of litigation, over collisions for instance [*e.g., Charles Zubik & Sons, Inc. v. Ohio River Company,* 208 F. Supp. 71 (W. D. Pa. 1962)] or even over real estate, it was natural in 1948 for a sick man, no longer able to play an active role in the business, to seek to limit his personal liability.[10]

As all parties to this appeal agree, the appropriate occasion for disregarding the corporate existence occurs when the court must prevent fraud, illegality, or injustice, or when recognition of the corporate entity would defeat pub-

[9] The towing business was apparently undergoing hard times in the years before this accident, in particular, business suffered after the 1959 flood.

[10] See *infra,* note 15.

lic policy or shield someone from liability for a crime. *Taylor v. Standard Gas Co.*, 306 U. S. 307 (1939); *Anderson v. Abbott*, 321 U. S. 349 (1944); *United States v. Goldberg*, 206 F. Supp. 394, 405 (E. D. Pa. 1962), aff'd on other grounds, 330 F. 2d 30 (3rd Cir. 1963), cert. den. 377 U. S. 953 (1964); *Tucker v. Binenstock*, 310 Pa. 254, 263, 165 Atl. 247 (1933). There is no doubt that an admiralty court has as part of its general jurisdiction sufficient equitable powers to apply this test, *Vaughan v. Atkinson*, 369 U. S. 527 (1962), however "unclear or unsettled" its operation may be in Pennsylvania or the country at large. *Barium Steel Corp. v. Wiley*, 379 Pa. 38, 47, 108 A. 2d 336 (1954).

In applying the test, however, any court must start from the general rule that the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception. *E.g., Erie Drug Company Case*, 416 Pa. 41, 43, 204 A. 2d 256 (1964). Care should be taken on all occasions to avoid making "the entire theory of the corporate entity * * * useless." *Price Bar, Inc. Liquor License Case*, 203 Pa. Super. 481, 484, 201 A. 2d 221 (1964); *Gagnon v. Speback*, 389 Pa. 17, 21, 131 A. 2d 221 (1957); *cf. Miller v. Bethlehem Steel Corporation*, 189 F. Supp. 916, 917 (S. D. W. Va. 1960). Cases in bankruptcy[11] or in taxation[12] call for an entirely different evaluation of "fraud" or "injustice" than cases of controlled corporate subsidiaries,[13] or, as in this instance, a case of corporate

[11] *E.g., Taylor v. Standard Gas Co.*, 306 U. S. 307 (1939); *Mayo v. Pioneer Bank & Trust Company*, 274 F. 2d 320 (5th Cir., 1960), affirming, on petition for rehearing, 270 F. 2d 823 (5th Cir. 1959).

[12] *E.g., New Colonial Co. v. Helvering*, 292 U. S. 435 (1934); *Burnet v. Clark*, 287 U. S. 410 (1932); *United States v. Goldberg*, 206 F. Supp. 394 (E. D. Pa. 1962) aff'd on other grounds, 330 F. 2d 30 (3rd Cir. 1963), cert. den. 377 U. S. 953 (1964).

[13] *E.g., Whayne v. Transportation Management Service, Inc.*, 252 F. Supp. 573 (E. D. Pa. 1966); *Miller v. Bethlehem Steel Corporation*, 189 F. Supp. 916, 917 (S. W. W. Va. 1960); *Garrett v. Southern Railway Company*, 173 F. Supp. 915 (E. D. Tenn. 1959); *Garden City Co. v. Burden*, 186 F. 2d 651 (10th Cir. 1951); 50 A. L. R. 611; 7 A. L. R. 3d 1343.

tort.[14] The defrauded creditor or "victim" of a business transaction with an undercapitalized corporation, for instance, often has a strong case for piercing the veil of a "sham" corporation. See 63 A. L. R. 2d 1051. The controversy in such cases invariably involves some degree of reliance by the plaintiff, contributing to the fraud, or undue advantage or trick accenting the injustice. But the injured tort claimant stands on a different footing. It is not contended that the claimants here relied upon Zubik Corporation's being more than a "mere operating company."

Limiting one's personal liability is a traditional reason for a corporation. Unless done deliberately, with specific intent to escape liability for a specific tort or class of torts, the cause of justice does not require disregarding the corporate entity.[15] The corporate form itself works no fraud on a person harmed in an accident who has never elected to deal with the corporation.

Once fraud or injustice demand piercing the corporate veil, then the intertwining of personal affairs with a family corporation can provide additional grounds for arguing that the defendant cannot be heard to complain. In such cases, the failure of various corporate formalities either contributes to the fraud involved or strengthens the argu-

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[14] Counsel have been unable to cite a case where the corporate entity was disregarded to make an individual liable for tort. As it was stated in *Geller v. Transamerica Corporation*, 53 F. Supp. 625, 631 (D. Del. 1943): "In the absence of extraordinary circumstances, a court will not disregard the corporate fiction and hold a stockholder liable for the torts of the corporation."

[15] "The organization of a corporation for the avowed purpose of avoiding personal responsibility does not of itself, however, justify disregard of the corporate entity." 1 Fletcher Cyc. Corp., § 41.2 (p. 181) (Perm. Ed. Rev. 1965). See *Mull v. Colt Co.*, 178 F. Supp. 720, 721 (S. D. N. Y. 1959); *In Re Sheridan's Petition*, 226 F. Supp. 136, 138-9 (S. D. N. Y. 1964); *Elenkreig v. Siebrecht*, 238 N. Y. 254, 144 N. E. 519, 34 A. L. R. 592 (1924); *McMillan Welding & Machine Works v. General Towing Co.*, 247 F. Supp. 402, 405-6 (E. D. La. 1965). Compare *Mull v. Colt Co.*, 31 F. R. D. 154 (S. D. N. Y. 1962), where allegations of deliberate fraud (not present in the findings of the trial judge) were found sufficient to state a cause of action for piercing the corporate veil.

ment for injustice by holding the individual in effect estopped. But in the case of an old (71 at the time of trial), illiterate, ill man, the conduct of personal affairs through a family corporation not only has its separate justification unreleated to fraud or injustice but it fails as a "make weight" argument for ignoring the corporate entity.[16] Nothing in the record indicates that an "operating company" such as Zubik Corporation was unique, or that it perpetrated a fraud on the Pittsburgh river community.[17] Neither does it justify a finding that the libellants in this case were defrauded in any respect by lack of corporate formalities of Zubik Corporation or the fact that it paid Charles, Sr. by debiting his account, rather than drawing a regular salary check to his order. Nowhere does it appear that anyone failed to insure or felt protected in reliance upon Zubik Corporation's assets.

This record does not justify holding Charles Zubik, Sr. individually liable by disregarding the corporate existence of Zubik Corporation.

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[16] The Zubik Corporation not only had carried on a legitimate business for 16 years in the dredging and hauling of sand and gravel, it had expanded into the production of concrete as well. It was a going concern, hiring and firing employees, paying their bills. Their is no problem here of a mere corporate shell, *Shechter v. Shechter*, 366 Pa. 30, 76 A. 2d 753 (1950), or of a fraudulent conveyance, *Gagnon v. Speback*, 389 Pa. 17, 131 A. 2d 619 (1957).

[17] A person who travels on the river, like a person who travels on the highway, does not evaluate the financial responsibiilty or structure of each person who may collide with him. No evidence or testimony shows that the libellants in any way relied upon the existence or non-existence of Zubik Corporation in their decision to be on the river or run the risks (insured or uninsured) of the river. Also, it is noted that Harry Zubik, who has almost half of the total judgment against Zubik Corporation, was a son of Charles, Sr., an owner of the stock in Zubic Corporation, and a former employee and vice-president of the corporation. He knew how its business was conducted and testimony revealed that he too used a corporation to conduct his large business. Elmer P. Grimm, who has a substantial part of the rest of the judgment, worked for Charles, Sr. for 17 years and as an experienced fellow bargeman knew a great deal about other operators—even their sales and purchases of equipment.

III.

The trial judge also found Charles, Sr. individually liable, apparently finding that he participated sufficiently in the negligent acts (Conclusions of Law 2, 4 and 5) to be responsible for this accident. Such participation in negligent acts, or privity to or knowledge of negligent acts, was supported by Findings of Fact 12 and 13 and the trial judge's conclusion that the corporation was merely the "alter ego" of Charles, Sr. with "direct privity" existing between all employees and officers in the maintenance and control of the vessels and marine equipment. Since we find that the corporation had a separate existence, Charles, Sr.'s individual liability must rest upon the two Findings of Fact: that he was personally at the landing "shortly before" the fleet broke loose and that, throughout the period preceding the accident, he was always within the "immediate area" of the barges.[18]

These two Findings by the trial judge do not, as a matter of law, allow a conclusion that Charles, Sr. was individually liable for the negligence and the record does not justify a finding that Charles, Sr. either participated sufficiently in the negligent acts themselves or neglected some duty of supervision over the officers and employees of the corporation who brought about the harm.

Charles, Sr. was an old (71) man, ill in health, and unable to participate physically in river work. During the time preceding the breakaway, he was in his office boat, downstream from the landing where the barges were

[18] We do not deal with the finding of "privity" as a ground for denying Charles, Sr.'s petition for exoneration from and limitation of liability (No. 64-51 in Admiralty below). But such "privity" cannot, without more, satisfy the libellants' burden of establishing Charles, Sr.'s individual liability for negligence. As noted below, note 24, the appeal (No. 15951) from the judgment denying Charles, Sr.'s petition for exoneration and limitation is moot in view of the reversal of the judgments entered against Charles, Sr. individually in the District Court.

moored. During those days he sat and talked to his sons advising them on the basis of his past experience. The closest he came to participation was to look at the barge fleet from his automobile or office boat; he had nothing to do personally with tying up the fleet. Rather, he "talked" to his sons, Charles, Jr. and Donald, and to other employees, saying "what if anything can be done, that is what we are going to try"; these others did all the negligent mooring. Although Charles, Sr. had some information concerning the impending ice flow, all he could do physically was pass it on to the others, and give advice. The night of the breakaway Charles, Sr. apparently visited the landing, observing as usual from his car. That night he left his car only because it became stuck on some railroad tracks. No testimony reveals what Charles, Sr. could have observed at that time of night (approximately 3 A. M.) as to the condition of the barges or their mooring.[19] The extent of his participation was to ask an experienced employee if everything was all right.

The employees and officers who assumed responsibility for the actual mooring were all experienced.[20] Charles, Jr. and Donald Zubik were also acting with a personal interest in protecting the property of their family corporation. The agents of the corporation on whom Charles, Sr. relied were competent. See *Coryell v. Phipps*, 317 U. S. 406 (1943); *Briggs v. Spaulding*, 141 U. S. 132, 147 (1891).

Libellants have not sustained their burden of proving Charles, Sr.'s personal participation in the negligent acts, which is crucial on this record:

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[19] Apparently a flashlight was needed to see the ropes or lines and Charles, Sr. "just looked" from the shore, without any light. No floodlights were turned on.

[20] Charles Zubik, Jr. had worked on the river for about 17 years, Donald Zubik for 15 or 18 years, and Russell Hammack for 15. Charles, Jr. and Donald Zubik, the active heads of the business, knew the barges and the perils of an ice flow.

> "The general, if not universal, rule is that an officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefor; but that an officer of a corporation who takes no part in the commission of the tort committed by the corporation is not personally liable to third persons for such a tort, nor for the acts of other agents, officers or employees of the corporation in committing it, unless he specifically directed the particular act to be done, or participated, or cooperated therein." 3 *Fletcher Cyc. Corp.* § 1137 (pp. 782-3) (Perm. Ed. Rev. 1965).

19 C. J. S. Corporations, § 845 (pp. 271-273); see *Chester-Cambridge B. & T. v. Rhodes,* 346 Pa. 427, 433, 31 A. 2d 28 (1943). The trial judge's only two relevant Findings of Fact on this issue merely state that Charles, Sr. "visited" the landing shortly before the fleet of barges broke loose, and that he was "within the immediate area" of the accident (1155-42a).[21] Such does not constitute participation sufficient to charge Charles, Sr. with the negligence of agents of Zubik Corporation. This record, insofar as it covers the point, shows that Charles, Sr. fully discharged whatever duty he had to advise the "active heads" of the corporation and that his acts of observation and "instruction" to his sons and others did not constitute participation by an old and infirm riverman in the negligent mooring of the barges or in the misfeasance of not moving them in time to safer waters.

Furthermore, in view of the foregoing conclusion that the corporate entity cannot be treated as the "alter ego" or mere instrumentality of Charles, Sr., we also cannot

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[21] Findings of Fact 3 and 5 attribute certain knowledge to Charles, Sr., but add nothing to the question of Charles, Sr.'s participation. Conclusion of Law 2 seems unsupported by the evidence, since no testimony shows that Charles, Sr. participated in the "stationing, mooring and securing of the barges" in 1964. Conclusion of Law 4 finds that Charles, Sr. "permitted" an act which contributed to the accident. But there is nothing to indicate that his "permission" had any effect one way or another on the inadequate mooring or timberhead stress.

agree that Charles, Sr. is individually liable for the accident by imputing to him the acts and knowledge of the various corporate agents who did participate.[22]

For the foregoing reasons, we will affirm the District Court in Nos. 15940 through 15949 as to the judgments entered against Charles Zubik & Sons, Inc. (Nos. 64-35, 64-39, 64-40, 64-41, 64-42, 64-45, 64-46, 64-47, 64-48, 64-49, all in Admiralty in the United States District Court for the Western District of Pennsylvania). Those judgments will be reversed insofar as they are entered against Charles Zubik, Sr. individually.[23] The denial of the petition of Charles Zubik & Sons, Inc. for exoneration from or limitation of liability (No. 6-50 in Admiralty), appealed in No. 15950, will be affirmed. The appeal (No. 15951) from the denial of the petition of Charles Zubik, Sr., individually, for exoneration from or limitation of liability (No. 64-51 in Admiralty) will be dismissed as moot,[24] in view of our reversal of the judgments entered against him individually.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[22] See note 18, *supra;* this does not mean that we reverse the trial judge's finding of "privity" to the extent that such finding may have been grounds for denying Charles, Sr.'s petition for exoneration and limitations of liability. See, *e.g., Coryell v. Phipps,* 317 U. S. 406, 408 (1943), on the separability of this issue from the issue of liability in tort that may arise by disregarding a corporate entity.

[23] It is noted that the judgment entered April 12, 1966, against Charles, Sr. in favor of appellee Squires (No. 64-49 in Admiralty) was deleted by order of April 13, 1966.

[24] See note 18, *supra.* Since Charles, Sr. selected competent men to moor the corporation's barges and was not on notice as to the existence of any defect in the location, mooring or condition of these barges on this record, it would appear, but it is not necessary to decide, that his estate is entitled to at least the benefit of the limitation of liability provided for in 46 U. S. C. § 183. See *Coryell v. Phipps,* note 2, *supra.*

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,940.

HARRY C. ZUBEK and LORRAINE F. ZUBIK, his wife, and HARRY ZUBIK, COMPANY, INC.,
vs.
CHARLES ZUBIK, JR. and VIRGINIA ZUBIK DRAMBEL, Executors of the Estate of Charles Zubik, Sr. and CHARLES ZUBIK & SONS, INC.,
Appellants.

(D. C. Admiralty No. 64-35.)

No. 15,941.

LAWRENCE W. BEAVER,
vs.
CHARLES ZUBIK, JR. and VIRGINIA ZUBIK DRAMBEL, Executors of the Estate of Charles Zubik, Sr. and CHARLES ZUBIK & SONS, INC.,
Appellants.

(D. C. Admiralty No. 64-39.)

No. 15,942.

JAMES H. HALEY,
vs.
CHARLES ZUBIK, JR. and VIRGINIA ZUBIK DRAMBEL, Executors of the Estate of Charles Zubik, Sr. and CHARLES ZUBIK & SONS, INC.,
Appellants.

(D. C. Admiralty No. 64-40.)

No. 15,943.

CHARLES THORNTON,
vs.
CHARLES ZUBIK, JR. and VIRGINIA ZUBIK DRAMBEL, Executors of the Estate of Charles Zubik, Sr. and CHARLES ZUBIK & SONS, INC.,
Appellants.

(D. C. Admiralty No. 64-41.)

No. 15,944.

ELMER P. GRIMM,
vs.
CHARLES ZUBIK, JR. and VIRGINIA ZUBIK DRAMBEL, Executors of the Estate of Charles Zubik, Sr. and CHARLES ZUBIK & SONS, INC.,
Appellants.

(D. C. Admiralty No. 64-42.)

No. 15,945.

ELMER P. GRIMM,
vs.
CHARLES ZUBIK, JR. and VIRGINIA ZUBIK DRAMBEL, Executors of the Estate of Charles Zubik, Sr. and CHARLES ZUBIK & SONS, INC.,
Appellants.

(D. C. Admiralty No. 64-45.)

No. 15,946.

ELMER P. GRIMM,
vs.
CHARLES ZUBIK, JR. and VIRGINIA ZUBIK DRAMBEL, Executors of the Estate of Charles Zubik, Sr. and CHARLES ZUBIK & SONS, INC.,
Appellants.

(D. C. Admiralty No. 64-46.)

No. 15,947.

ELMER P. GRIMM,
vs.
CHARLES ZUBIK, JR. and VIRGINIA ZUBIK DRAMBEL, Executors of the Estate of Charles Zubik, Sr. and Charles Zubik & Sons, Inc.,
Appellants.

(D. C. Admiralty No. 64-47.)

No. 15,948.

ELMER P. GRIMM,
vs.
CHARLES ZUBIK, JR. and VIRGINIA ZUBIK DRAMBEL, Executors of the Estate of Charles Zubik, Sr. and CHARLES ZUBIK & SONS, INC.,
Appellants.

(D. C. Admiralty No. 64-48.)

On Appeals from the United States District Court for the Western District of Pennsylvania

Present: Kalodner, Hastie and Van Dusen, *Circuit Judges.*

JUDGMENT.

These causes came on to be heard on the records from the United States District Court for the Western District of Pennsylvania and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, filed April 13, 1966, be, and the same are hereby affirmed, with costs, as entered against Charles Zubik & Sons, Inc.; and are reversed, with costs, insofar as they are entered against Charles Zubik, Sr., individually.

ATTEST:

THOMAS F. QUINN,
Clerk.

September 29, 1967.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,951.

In the Matter
of
Petition of CHARLES ZUBIK, individually, for exoneration from or limitation of liability

CHARLES ZUBIK, JR. and VIRGINIA ZUBIK DRAMBEL, Executors of the Estate of Charles Zubik, Sr.,
Appellants.

(D. C. Admiralty No. 64-51.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: Kalodner, Hastie and Van Dusen, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the appeal from the judgment of the District Court, filed April 13, 1966, which denied the petition of Charles Zubik, Sr., individually, for exoneration from or limitation of liability be, and the same is hereby dismissed as moot, in view of this Court's reversal of the judgments entered against him individually.

ATTEST:

THOMAS F. QUINN,
Clerk.

September 29, 1967.

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 15940 through 15948.

HARRY C. ZUBIK and LORRAINE F. ZUBIK, His Wife, and HARRY ZUBIK COMPANY, INC., LAWRENCE W. BEAVER, JAMES H. HALEY, CHARLES THORNTON, ELMER P. GRIMM,

v.

CHARLES ZUBIK, JR. and VIRGINIA ZUBIK DRAMBEL, Executors of the Estate of Charles Zubik, Sr., and CHARLES ZUBIK & SONS, INC.,

Appellants.

No. 15951.

In the Matter
of
Petition of CHARLES ZUBIK, Individually, for Exoneration From Or Limitation of Liability
CHARLES ZUBIK, JR. and VIRGINIA ZUBIK DRAMBEL, Executors of the Estate of Charles Zubik, Sr.,

Appellants.

SUR PETITION FOR REHEARING.

Present: Staley, Chief Judge, and McLaughlin, Kalodner, Hastie, Smith, Freedman, Seitz and Van Dusen, *Circuit* Judges.

The petition for rehearing filed by Harry C. Zubik and Lorraine F. Zubik, his wife, Harry Zubik Company, Inc., Lawrence W. Beaver, James H. Haley, Charles Thornton and Elmer P. Grimm in the above entitled case having

been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc,* the petition for rehearing is denied.

BY THE COURT,

/s/ FRANCIS L. VAN DUSEN,
Judge.

Dated: November 6, 1967.

Appendix E

MOTION AND ORDER FOR STAY PENDING APPEAL UPON FILING OWN RECOGNIZANCE.

* * * *

4. Following further testimony on damages, there was a finding in the Court below that the plaintiffs were entitled to recover from the appellants herein the aggregate sum of $207,540.

5. Judgments were entered accordingly in the several actions below on April 13, 1966.

6. On April 21, 1966, appellants herein filed notice of appeal to this Honorable Court under 28 U. S. C. 1292 with respect to each of the aforesaid judgments; such appeals were docketed in this Court on May 31, 1966.

7. Appellants believed that they have a meritorious appeal because:

(a) Material issues of fact are in controversy; and

(b) The Court erred in certain rulings of law in granting the relief requested by the several plaintiffs.

8. Appellants have attempted, without success, to make arrangements for the posting of a supersedeas bond by a responsible surety.

9. Appellant Charles Zubik is the owner of assets substantially in excess of the aggregate of the decrees entered against both appellants in the Court below, but such assets comprise a minimum amount of cash or reasonably liquid assets and are almost exclusively concentrated in real estate and vessel properties:

(a) Said real estate consists of ten properties, some improved, some unimproved, having a value, according to 1965 assessments, in excess of $220,000; it is believed that the fair market value of these properties is at least $300,000. Three of the said properties, together with a fourth property which is not owned by either of the appellants herein, have a value, according to 1965 assessment, of $77,315, but are subject to a pre-existing mortgage of $95,000, since reduced to approximately $92,000. A fourth property, with a value, according to 1965 assessment, of $99,800, is subject to a pre-existing mortgage in the sum of $10,000.

(b) In addition to certain barges, the individual appellant, Charles Zubik, is the owner of eleven vessels which had a fair market value, on or about May 13, 1966, according to the opinion of a qualified appraiser, in excess of $650,000. All of said vessels are owned by the individual appellant, Charles Zubik, free and clear of any existing liens and encumbrances.

10. The corporate appellant, Charles Zubik & Sons, Inc., is engaged in a sand, gravel and concrete business and uses the said floating equipment to transport materials on the Allegheny and Monongahela Rivers.

11. All of the said floating equipment, including the aforementioned barges, are owned by appellant Charles Zubik, individually, but all of them are presently under bareboat charter to the corporate appellant, Charles Zubik & Sons, Inc.

12. Unless a stay of execution is issued the appellants fear that some or all of the plaintiffs in the Court below may issue execution against some or all of the aforementioned floating equipment and against other real * * *